No. 83-747

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Petitioner,

v.

PAUL D. JOHNSON, *et al.*,
Respondents.

On Writ of Certriorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF *AMICUS CURIAE* OF ALLIANCE OF AMERICAN INSURERS IN SUPPORT OF PETITIONER

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THE INTEREST OF *AMICUS CURIAE*, THE ALLIANCE OF AMERICAN INSURERS

Pursuant to Rule 36 of the Revised Rules of the Supreme Court of the United States, and with the written consent of the parties to this proceeding, the Alliance of American Insurers files this brief *amicus curiae* in support of the petitioner, Washington Metropolitan Area Transit Authority (WMATA).

The Alliance of American Insurers is an association of 170 insurance companies whose members write property and casualty insurance, including employers' miscellaneous or general liability, throughout the United States. In 1982, the total direct premiums written by Alliance member companies for all lines of insurance was $12,572,609,164.00 representing 12.32% of the total

market. In 1982, the total direct premiums written by Alliance companies for workers' compensation insurance on a country-wide basis for state law mandated workers' compensation and the federal Longshoremen's and Harbor Workers' Compensation Act was $3,484,407,997.00 representing 22.63% of all such insurance.

As insurers, Alliance member companies have a direct interest in the judicial interpretations of the laws which they must underwrite and the impact that such interpretations will have on the workers' compensation system. We believe that the decision of the Court below, unless reversed, will have a significant and substantially adverse impact on both the workers' compensation system and the judiciary which must be brought to this Court's attention.

SUMMARY OF ARGUMENT

Contrary to the opinion of the Court below, *amicus curiae* submits that § 904(a) of the Act clearly requires WMATA—the general contractor—to secure the payment of workers' compensation. It may do so by purchasing insurance or by forming an approved self-insurance program. WMATA purchased wrap-up insurance on behalf of itself and all subcontractors. Only in those instances when the subcontractor already has undertaken that obligation for its own employees is the general contractor excused from its obligation to do so, and then only as to the employees of that particular subcontractor. None of WMATA's subcontractors secured the payment of compensation for employees working on the WMATA Metro construction project which is the subject of this proceeding.

Amicus curiae submits that the Court below improperly denied to WMATA the right of exclusivity of remedy which the LHWCA affords to other employers subject to the Act. The social costs that will accrue if the

decision below is not reversed are more than the workers' compensation system can bear. The decision will spawn a flood of litigation which greatly will exacerbate the problems of an already overburdened judicial system—third party negligence actions against the compensation providing employer. The primary beneficiaries of such suits will be attorneys. The injured worker has at best a minimal chance of gaining anything above the compensation paid by the employer.

Congress, after hearing the complaints of the judiciary, employers and insurance carriers about such actions, recognized that the main beneficiaries were a few attorneys; that the judicial and compensation systems suffered; and that the injured employee gained little. In 1972 Congress amended the LHWCA to cure those problems with respect to one group of employers. There was no need to do so with respect to general contractors since § 904(a) already had resolved the problem.

The decision of the Court below, unless reversed by this Court, soon will present the general contractor, the insurance carrier as well as the judiciary with the very same problem Congress sought to eliminate in 1972. The injured worker whom the law is designed to protect will derive only minimal, if any, additional money. The purpose of workers' compensation is to provide readily available benefits, including medical expenses and rehabilitation, to the injured worker. Workers' compensation is not intended to be a vehicle for monetary gain to attorneys or for an increased burden on the Courts.

Amicus curiae submits that the decision below is wrong as a matter of law and that the social costs it will create are simply too great to support it. The decision should be reversed by this Court.

ARGUMENT

I. WMATA IS AN "EMPLOYER" WITHIN THE MEANING OF SECTION 904(a)

WMATA is, and was at the time these injuries occurred, an employer of some employees in the District of Columbia. Those WMATA employees were entitled to the compensation benefits prescribed by the federal Longshoremen's and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 901 *et seq.* because the District of Columbia Workers' Compensation Act, D.C. Code § 36-501 *et seq.* adopted the provisions of the LHWCA.[1] As to those employees WMATA is required by statute, § 904(a) of the Act, to secure the payment of compensation payable under §§ 907, 908 and 909 of the Act. An employer may fulfill that statutory obligation either by insurance purchased from an authorized insurance carrier or by a self-insurance program authorized by the Secretary of Labor pursuant to § 932 of the Act. For its administrative and operating employees WMATA chose to self-insure.

In addition, WMATA purchased insurance from an authorized carrier to meet its statutory duty under § 904 with respect to employees of subcontractors working on the METRO project by means of "wrap-up insurance" in which WMATA and the various subcontractors were named insureds. The second sentence of § 904(a) provides:

> "In the case of an employer who is a subcontractor, the contractor shall be liable for and shall secure the payment of such compensation to the employees of the subcontractor unless the subcontractor has secured such payment."

A plain reading of that sentence, in the context of WMATA's situation, is that WMATA as an employer

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[1] For simplicity, as did the Court below, references to the compensation act will be referred to by the federal statute section numbers.

and as a "contractor" has the primary obligation to secure compensation for its own and subcontractor's employees. However, if the subcontractor secures compensation, then WMATA may be relieved of that primary obligation as to that subcontractor's employees.

It sems clear that since the primary purpose of any workers' compensation act is to provide adequate compensation to all employees injured in the work place, regardless of fault, making the general, or overall, employer primarily responsible is the most certain way to accomplish that result. If a subcontractor undertakes to secure compensation, and only then, is the general contractor relieved of its § 904 responsibility. *Amicus curiae* believes that the Court below erroneously reversed the scheme of priorities intended by Congress.

II. THE COST TO THE WORKERS' COMPENSATION SYSTEM

The decision of the Court below will cause massive insurance problems for general contractors such as WMATA and for all subcontractors working on sites or projects involving multiple employers, and not one employee will benefit in the slightest. The courts will be flooded with third party actions, indemnity actions between contractors and subcontractors, and the insurance industry will be flooded with subrogation claims. No injured worker will receive an additional dollar in workers' compensation payments. The individual worker may receive some additional money in a successful third party action, but the prime beneficiary of the Court's decision is the plaintiff's bar which will receive *two* legal fees for each individual injury. The most adverse impact will fall upon a court system already overburdened with case backlogs of distressing size.

The decision below changes neither workers' compensation benefits nor those to whom such benefits are to be paid. All injured workers remain entitled to compensa-

tion benefits from their employer. Either their immediate employer or the employer of their employer (the general contractor) must secure the payment of those benefits. Wrap-up insurance is one way to secure such payments, and the *quid pro quo* is that the employee knows that if injured, someone is going to pay compensation benefits. It makes no difference to the employee who pays those benefits, so long as someone does and assures that prompt and adequate medical treatment is available.

Wrap-up insurance, and indeed the second sentence of § 904(a) of the Act, benefits all employees on a multi-employer job site more than it benefits the general contractor. In the case of WMATA and the instant proceeding wrap-up insurance also benefits the general public through reduction in the total cost of the taxpayer supported Metro system.

Workers' compensation insurance is now, and always has been, available to any employer, even those obliged to secure LHWCA insurance which no one denies is the most expensive workers' compensation law in the country. For example, on November 14, 1979, a subcommittee of the Congress was told the following: [2]

> "One view of the costs of benefits mandated by the Longshoremen's and Harbor Workers' Act is to relate them to the WMATA project. The chart here demonstrates some of the following points.
>
> The total of 31.2 miles of the Metrorail system are now in operation and there are 32.5 miles under construction: A total of 63.7 miles. So far the value of all work in place exceeds $2.875 billion.
>
> Compensation claims subject to the Longshoremen's and Harbor Workers' Act which were incurred under

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[2] Oversight Hearings on the Longshoremen's and Harbor Workers' Compensation Act, Subcommittee on Labor Standards, Committee on Education and Labor, House of Representatives, Ninety-Sixth Congress, First Session, p. 181.

> our policies since 1971 exceed $111 million. *Relating the value of just those claims we are handling to the miles of the rapid rail transit system completed and partially completed, $1.7 million of Longshoremen's claims have been incurred so far for each mile currently finished or under construction.*
>
> In 1971, an average rate of $7 per $100 of workers' payroll was adequate to cover losses at the benefit levels then applying. The 1972 amendments to the act calling for expanded and annual increases in benefits resulted in periodic increases until now the average rate is $53." (Emphasis supplied.)

There is no doubt that but for the wrap-up insurance program adopted by WMATA to fulfill its § 904 obligations, the cost would have been greater than $1.7 million per mile of subway track, and the cost of insurance more than $53 per $100 of payroll.

How many small businesses can afford to pay $53 or more per $100 of payroll for workers' compensation insurance, and how many small businesses can compete for work with larger, more financially secure competitors? Wrap-up insurance attempts to solve not only the problem of overall cost but also the problem facing small and medium-size companies acquiring any insurance—not unavailability but unaffordability.

LHWCA insurance is available to an employer either in the voluntary insurance market, or by insurance pooling arrangements (assigned risk pools)[8] or by state insurance funds when there is no voluntary insurance market. But it is always available somehow because the coverage is mandatory. However, to many it may be unaffordable. Unaffordability is caused by the terms of the law, not the insurance industry whose rates for workers' compensation premiums are subject to regulation by the several states and the District of Columbia. A de-

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[8] See footnote 4.

tailed explanation of the rate approval process appears at pages 161-179, Statement of George Reall, President, National Council on Compensation Insurance.[4] No doubt WMATA was able to take advantage of the premium discounts described by Mr. Reall (Hearings—p. 164) and realized overall cost savings which it would not have realized had each subcontractor included its individual workers' compensation insurance costs in its bid to WMATA. However, under either system compensation benefits to individual employees remain the same, while under a single wrap-up policy *claims processing is expedited* to the injured worker's benefit, and system cost is reduced to the employer's (WMATA) benefit and that of the system user and taxpayer.

Expedited claims handling is the key to any successful workers' compensation program. The primary beneficiary is, of course, the injured employee. The system—and the insurance industry—are secondary beneficiaries along with employers. In testimony before the Congress, Mr. Maximilian Walach, Superintendent of Insurance, D.C. Department of Insurance, stated that insurance carriers providing workers' compensation insurance in the District of Columbia for all employers, except those involved in subway construction, had pure loss ratios under the LHWCA which rose from 54.9% in 1971 to 102.8% in 1976. The cause of the underwriting loss and the increase in premium in Mr. Walach's view is stated to be:[5]

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[4] Oversight Hearings on the Longshoremen's and Harbor Workers' Compensation Act, Subcommittee on Labor Standards, Committee on Education and Labor, House of Representatives, Ninety-Sixth Congress, First Session (November 14, 1979), pp. 161-179.

[5] Oversight Hearings on the Longshoremen's and Harbor Workers' Compensation Act, Subcommittee on Compensation, Health and Safety, Committee on Education and Labor, House of Representatives, Ninety-Fifth Congress, First Session, Vol. 1, pp. 803-818 at pp. 808 and 810.

> "It seems to be that the *rate* is only the *result* of various economic *causes*. Unless the various causes before injury and the claims handling afterwards, as well as the costs in providing medical benefits and other cost factors are reduced, premiums will not go down. One has to give first priority as to how to reduce costs of this program."

This is what WMATA intended to do, and in doing so directly benefited all employees working on the Metro system. This, *amicus curiae* suggests, is precisely what Congress intended by the second sentence of § 904(a) of the Act.

III. THE JUDICIAL SYSTEM IS THE LOSER

Having satisfied its charter obligations to conserve expenditures and its statutory duty to secure workers' compensation payments, WMATA and the courts in the District of Columbia find themselves faced with the specter of about 22,000 third party suits arising from Metro construction as a result of the decision of the Court below. All other employers subject to the LHWCA (except stevedore contractors) and the courts in the jurisdictions in which they do business are similarly faced with increased third party actions.

Based upon insurance industry experience, WMATA can expect, under its miscellaneous liability insurance, cost increases of about $1 for every $2 paid out in workers' compensation. Third party claims are paid and defended pursuant to an employer's general liability insurance policy while employee claims are paid pursuant to the workers' compensation insurance policy. In most cases, general liability insurance premiums are experience rated. Usually there is no assigned risk provision or guarantee of coverage as in the case of workers' compensation. General liability is for the employer's protection—workers' compensation is for the employee's protection. In many instances the employer may have different insurance car-

riers for each type of policy. Not all workers' compensation carriers offer general liability insurance, and not all general liability carriers offer workers' compensation insurance.

The decision of the Court below may well have ramifications on the employers, carriers, and judicial system beyond the potential of adding one third party negligence suit or claim for every worker's compensation claim. Some general contractors may resort to indemnification or hold harmless agreements from their subcontractors. Then, the judicial system may well find itself confronted with the additional burden of indemnification actions between contractor and subcontractor.

That is precisely the situation in which the federal judiciary, employers, and insurance carriers found themselves before 1972. A situation about which the judges in the Third Circuit complained in 1967 and 1968, *Turner v. Transportacion Maritime Mexicana, S.A.*, 44 FRD 412 (1968), and which Chief Judge Clary described in a statement published by the Subcommittee on Improvement in Judicial Machinery of the Committee on the Judiciary, United States Senate, in their document captioned "Crisis in the Federal Courts—1967." *Id.* at 416.

> "While in 1961 the longshoremen cases constituted only 8% of the total tort actions, . . . they constituted more than 23% of the total tort actions in June of 1966. Had that trend continued in its same progressive growth for another five years, the longshoremen cases could have constituted almost 60% of the total tort actions in our Court. . . ."

In 1972 Congress sought to eliminate the problem of third party suits and indemnification actions among worker-stevedore contractor-vessel owner by substantially increasing LHWCA benefit levels; eliminating suits directly or indirectly against the stevedore contractors; and by restricting the grounds for third party actions (*Northeast*

Marine Terminal et al. v. Caputo et al., 432 U.S. 249 1977). While increasing benefits to longshoremen employees of stevedores, Congress also increased benefits to the employees of every other employer subject to the LHWCA—WMATA included.

As no other group of LHWCA employers sought the specific relief from longshoreman-stevedore-vessel third party/indemnification actions which plagued the parties and the courts, the specific relief granted by Congress was limited. However, the second sentence of § 904(a) does provide the same legal protection to contractors and subcontractors unless it is interpreted as it has been by the Court below. In short, the decision of the Court below, if affirmed by this Court, will recreate the problem about which the judiciary complained in 1967-68 and which Congress thought it cured when it amended the LHWCA in 1972. For that reason alone, the decision of the Court below should be reversed.

The only certain beneficiaries of the decision of the Court below are the lawyers. As the Congress noted: [6]

> "The social costs of these lawsuits, the delays, crowding of court calendars and the need to pay for lawyers' service have seldom resulted in a real increase in actual benefits for injured workers."

In large measure, the 1972 amendments to the LHWCA was Congress' answer to the question stated by Judge Higginbotham speaking for the judges of the U.S. District Court in Philadelphia and suggesting that Congress should make an inquiry into the LHWCA, to wit: [7]

> "If there is such an inquiry, several questions should be asked: (1) Do longshoremen (in contrast to their lawyers) generally come out with better financial re-

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[6] Senate Report No. 92-1125, 92nd Congress, 2d Session at p. 4, Senate Committee on Labor and Public Welfare, September 12, 1972.

[7] *Turner, supra*, at 420.

> sults by reason of this quality of litigation than they would if they had somewhat increased benefits and the statute was truly exclusive? . . . .".

Amicus curiae submits that should this Court ask the question stated by Judge Higginbotham of the decision of the Court below it would come up with the same answer as did the Senate Committee on Labor and Public Welfare. The decision below will not result in any increase in compensation benefits and will seldom result in any real increase of money to an injured employee. The real increase is in legal fees and costs to the employer and therefore to the consumer.

IV. ATTORNEYS ARE THE WINNERS

It cannot be overemphasized that the primary purpose of the LHWCA and all other workers' compensation laws is to provide readily available medical care and timely compensation payments to injured employees. The injured employee is thus assured prompt and certain redress for the work place injury. The injured worker may, but is not required to, bring an action against a third party who may have caused the injury. If the employee does not bring such an action within six months of receiving a compensation award, the employer or insurance carrier may. The compensation paying employer "is entitled to reimbursement of all compensation benefits paid the employee, and its costs, including attorneys fees. Of the remainder, four fifths is distributed to the longshoremen, and one fifth 'shall belong to the employer'." *Bloomer v. Liberty Mutual Insurance Co.*, 445 U.S. 74 (1980) at 86.

If the employee brings the third party action and is successful, he is entitled to retain the amount of the judgment *less attorney's fees* and less the full amount of compensation paid by the employer. The employee would not be entitled to double compensation, and the employer would better be able to pay compensation benefits re-

quired by the LHWCA, *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256 (1979), reh. den., 444 U.S. 889.

Another method Congress adopted to insure that the compensation system provided adequate benefits to injured employees was to control the legal fees that could be exacted in litigating LHWCA compensation claims. Section 928 of the Act provides that, in limited situations and subject to approval by the deputy commissioner, administrative law judge, the Benefits Review Board of the Department of Labor [8] or reviewing court, legal fees of the employee are to be paid by the employer. *National Steel and Shipbuilding Co. v. U.S. Department of Labor, Office of Workers' Compensation Programs*, 606 F.2d 875 (9th Cir. 1979).

To no one's surprise, attorneys' fees assessed against the employer for services rendered to the injured employee, being subject to (1) challenge by the employer, and (2) supervision and review by the Department of Labor and U.S. Courts of Appeals, do not equal or approach the contingent fees attorneys receive in third party actions. Also, it is a criminal offense (§ 928(e) of the Act) to seek any additional payment from the injured worker. *Hensley* v. *Washington Metropolitan Area Transit Authority*, 690 F.2d 1054 (D.C. Cir. 1982), *cert. den.*, 102 S. Ct. 1749 (1982).

With the injured worker's needs taken care of by the workers' compensation system and his modest (9 to 10%) legal fees having been paid by the employer, the injured worker's attorney next turns to a real or imagined third

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[8] The regulations published by the Department of Labor concerning attorneys' fees under § 928 are found at 20 C.F.R. § 702.132-702.135. Litigation concerning legal fees has been extensive; so much so that a synopsis of attorney fee litigation in the Department of Labor's *Longshore Desk Book*, Benefits Review Board Vol. A, BRBS 6-1 *et seq.* includes 24 pages of a total of 198 pages covering every section of the LHWCA.

party action under a contingent fee arrangement with the injured worker. This is the type of action in which the attorney stands to gain the most because if he wins anything by settlement or by judgment he gets paid first after costs. The injured worker has nothing to lose and might receive a bonus over and above his worker's compensation. All the attorney has to do is make sure that the third party action is brought within 6 months of the compensation award (§ 933(a) of the Act).

That is unless either the settlement or judgment does not greatly exceed the amount of the workers' compensation award as in *Johnson* v. *Sioux City & New Orleans Barge Lines*, 629 F.2d 1244 (7th Cir. 1980), *cert. den.*, 101 S.Ct. 408 (1980). That case involved an *appeal by the injured worker's attorney* from a district court decision which denied contingent legal fees of 40% which, after repayment of the compensation, would have resulted in *no money* to the injured worker. In denying such an unconscionable request the court noted at page 1249:

> "Such reflexive litigation (third party) brought on behalf of a party with minimal interest in the outcome (the injured worker) is inconsistent with the Act's 'special incentives designed to encourage the stevedore (employer) to bring suit on its own if the longshoreman (injured employee) elects not to do so.' *Bloomer*, 445 U.S. at 86 n.12, 100 S.Ct. at 932 n.12. Congress, we believe, intended that the stevedore (employer) pursue those cases, rather than the longshoreman's (injured worker's) attorney, who may be motivated by an artificially inflated contingent fee." (Parenthetical inserts supplied).

A comparison of *Bloomer* and *Johnson*, *supra*, demonstrates that, unless the third party judgment or settlement is substantially greater than the workers' compensation award, the injured worker really stands to gain nothing from a third party action brought on his behalf. The controlling factor in settlement negotiations or jury de-

mands thus becomes attorney fees. Pressures mount for excessive damages or for the employer/insurance carrier to waive or reduce the compensation lien.

Amicus curiae submits that Congress did not intend to encourage (1) suits between attorney and injured employees about legal fees; (2) settlement negotiation pressures to compel an employer to contribute directly or indirectly to a third party's damage payment and thus reduce his ability to provide workers' compensation; or (3) third party actions brought by attorneys for their own benefit in the name of a party who may have a minimal interest in the outcome.

The social costs of these suits, as the Senate Committee noted in 1972, are just too high and the potential benefits to the injured worker too low to justify the decision of the Court below. The added cost to the already overburdened workers' compensation system of the United States would be unacceptable to insureds, insurers, and self-insured employers. It is estimated that in 1983 some $2,720,000,000 was paid in premiums nationwide for workers' compensation insurance. At the same time the insurance industry incurred a combined loss and expense ratio of 100.08% before dividends, or 110.4% after dividends. The situation in which the workers' compensation system now finds itself has been described as follows:[9]

> "If, in terms of contract and of regulation of the business, the long range outlook for workers' compensation is uncertain, the short range underwriting prospects are not: This line has been losing money since 1971 to a total of $6.7 billion, with 20% of that falling in 1983—and all signs point downhill."

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[9] *Best's Review*, Property/Casualty Insurance Journal, January 1984, p. 95.

CONCLUSION

Unless the decision of the Court below is reversed, the deterioration of the workers' compensation system will be exacerbated and the social costs of the additional litigation spawned by the decision will rise to intolerable levels —all for the benefit of a few and with minimal benefit to the injured worker the system was designed to protect.

For the foregoing reasons, *amicus curiae* urges this Court to reverse the judgments of the Court below.

Respectfully submitted,

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